Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1999

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Petitioners

vs.

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD BARRETT
Counsel of Record
P O BOX 2050
LEARNED MS 39154
(601) 885-2288

Attorney for Petitioner

QUESTIONS PRESENTED

1. Should an Administrator's interpretation of a rule which imposes a fee for exercise of a First Amendment right be considered in a facial challenge to the rule?

2. Should conduct of an Administrator be relevant in determining arbitrariness under a fee-rule which impacts exercise of a First Amendment right?

3. Should Equal Protection and other points be considered as duly raised below or properly before the court either by way of appeal, as part of a facial challenge or *de novo*?

PARTIES TO THE PROCEEDINGS

Petitioners

Nationalist Television, a Texas non-profit corporation; Robert Horton; and, Barry Hackney.

Respondents

City of Houston, a Texas municipal corporation, and Access Houston Cable Corporation, a Texas corporation

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CORPORATE DISCLOSURE STATEMENT 2

CONSTITUTIONAL PROVISIONS 2

LOCAL RULE OF PROCEDURE 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. AN ADMINISTRATOR'S INTERPRETATION OF A RULE WHICH IMPOSES A FEE FOR EXERCISE OF A FIRST AMENDMENT RIGHT SHOULD BE CONSIDERED IN A FACIAL CHALLENGE TO THE RULE. 8

II. CONDUCT OF AN ADMINISTRATOR IS RELEVANT IN DETERMINING ARBITRARINESS UNDER A FEE RULE WHICH IMPACTS EXERCISE OF A FIRST AMENDMENT RIGHT 15

III. EQUAL PROTECTION AND OTHER POINTS WERE DULY RAISED BELOW AND ARE PROPERLY BEFORE THE COURT EITHER BY WAY OF APPEAL, AS PART OF THE FACIAL CHALLENGE OR *DE NOVO* 18

CONCLUSION 22

APPENDIX ..... App. 1

A. APPEALS' COURT OPINION ..... App. 1

B. APPEALS' COURT JUDGMENT .. App. 23

C. APPEALS' COURT ORDER OVERRULING PETITION FOR REHEARING ..... App. 25

D. DISTRICT COURT OPINION ..... App. 27

E. DISTRICT COURT JUDGMENT .. App. 61

F. DISTRICT COURT ORDER OVERRULING MOTION TO RECONSIDER ..... App. 63

TABLE OF AUTHORITIES

Cases

Associated Press v. United States, 326 U.S. 1 (1945) 11

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 16

Boos v. Barry, 485 U.S. 312 (1988) 14

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 19

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 10

City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 21

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 17, 18, 21

Cox v. New Hampshire, 312 U.S. 569 (1941) 17

Elrod v. Burns, 427 U.S. 347 (1976) 16

Follett v. Town of McCormick, 321 U.S. 573 (1944) 7

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123 (1992) 7, 8, 9, 12, 13, 16, 22

Horton v. City of Houston, Civ. Action No. H-92-CV-3451 1

Horton v. City of Houston, 179 F.3d 188 (5th Cir.1999) 1

Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston, 515 U.S. 557 (1995) 15, 19

Jones v. Opelika, 319 U.S. 103 (1943) 7

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 7

NAACP v. Button, 371 U.S. 415 (1963) 17

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8

Niemotko v. Maryland, 340 U.S. 268 (1951) 16

Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) 11

Regan v. Time, Inc., 468 U.S. 641 (1984) 15

Smith v. Goguen, 415 U.S. 566 (1974) 13, 18

The Nationalist Movement v. City of Boston, No. 1:94-CV-10825 (D.C.D.Mass.1998) 13

The Nationalist Movement v. City of Cumming, 913 F.2d 885 (11th Cir.1990), *vacated*, 921 F.2d 1125 (11th Cir.1990), *original opinion reinstated*, 934 F.2d 1482 (11th Cir.1991), *aff'd on different issue*, 505 U.S. 123 (1992) 14

Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) 15

Constitution

Amendment I, United States Constitution 2, 4, 6, 7, 8, 11, 12, 13, 15, 18, 19, 21, 22, 23

Amendment XIV, United States Constitution 2, 4, 20, 21

Statutes

28 USC §1254(1) 2

28 USC §2106 2

47 USC §521 7

47 USC §521(4). 14

47 USC §532(c)(2) 14

Local Rule

2.A-5 Program Contract and Responsibility 3

Rules

Rule 29.1, Supreme Court Rules 2

Other Authority

The Void-For-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960) 21

U.S. Code Congressional & Administrative News, 98th Cong., Vol. 5 (1984), pp. 4672, 4673 ..... 12, 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Nationalist Movement, by and through counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Fifth Circuit from which certiorari is sought is contained in the case styled *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* 179 F.3d 188 (5th Cir.1999), at Appendix A, dated June 18, 1999, which reversed and remanded a public-access cable-television rule which required payment of broadcast fees. The final judgment is at Appendix B, with mandate dated July 27, 1999. The order overruling the petition for rehearing is at Appendix C, dated July 19, 1999. The decision of the United States District Court for the Southern District of Texas, Houston Division, in the case styled *Robert Horton, Nationalist Television and Barry Hackney v. City of Houston and Access Houston Cable Corporation,* Civ. Action No. H-92-CV-3451, at Appendix C, dated October 16, 1997, was reversed and remanded. The final judgment is at Appendix D, dated October 16, 1997. The order overruling the motion to reconsider is at Appendix E, dated December 5, 1997.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1) and 2106.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1, Petitioner, Nationalist Television, states that it is a Texas non-profit corporation, having no parent corporation. It has no subsidiaries.

CONSTITUTIONAL PROVISIONS

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOCAL RULES OF PROCEDURE

2.A-5 PROGRAM CONTRACT AND RESPONSIBILITY: Before access programs are scheduled for cable-cast, the access program provider must sign a Program Contract which holds the program provider liable for content of the program and pay all applicable fees. In signing the Program Contract, the program provider agrees in writing that his or her program does not include any form of "constitutionally unprotected speech."

The said fees are set out on Page Three of the said Rules & Procedures, styled:

The Public Access Channel Fees:

Program Distribution

Programs Produced Locally

Individuals & Organizations FREE

Programs Produced Elsewhere

Individuals	$75 / hr
Organizations	$100 / hr

STATEMENT OF THE CASE

Petitioners Barry Hackney and Robert Horton, as residents of Houston, Texas, desired to broadcast a documentary and news program over the Houston public-access cable television channel. Petitioner, Nationalist Television, domiciled in Houston, is a non-profit charitable and educational corporation, which produces the program *Airlink* in Mississippi.

The content of *Airlink*, which is not obscene, has been described by Petitioners as "pro-majority" and by Respondents as "white supremacist."

For many months, Petitioners were bantered back and forth between Respondents over what forms to complete and where to file them. The nexus eventually was Respondents' attempt to charge $50.00 for each half-hour broadcast under a rule which imposed the fee on "non-locally produced" programs. Refusing to pay the fee, Petitioners commenced litigation to redress violations of the First and Fourteenth Amendments and the Cable Act.

The only hearing in the case was held on Petitioners' motion for a temporary restraining order, at which the Dis-

trict Judge cut short testimony and ruled against Petitioners. Testimony by Respondents' Administrator, however, did indicate that no guidelines were in place to guide his discretion in deciding what programming would be aired or, even, what was "local" and "non-local," in nature. The Administrator testified that he had broad waiver power which he would use in a standardless fashion. He testified that he would broadcast Ross Perot, filmed in Dallas, and Phil Gramm, filmed in Washington, for example, but not Robert Horton filmed in Mississippi, but that he might grant a waiver, on occasion.

The broadcast rules were based upon a percentage of programming being deemed "locally produced," based upon considerations as where the show was produced and that 51% of the content was "local", based upon the ultimate determination of the Administrator. The broadcasters were supposed to state if the program was "locally produced" according to an "honor system." There was no testimony as to anyone else ever having been levied a fee. The public-access channel had considerable time and space within which to accommodate additional programming.

After denial of injunctive relief, Respondents began broadcasting *Airlink* for three months, but canceled the series entirely when a program was submitted which criticized homosexuals in the military. Respondents alleged that the cancellation was for non-payment of the fees, although Petitioners had never agreed to pay any fees, but had strongly objected to the fees, throughout.

Eventually, the trial court granted summary judgment

in favor of Respondents on the grounds that there was no evidence that Respondents had acted arbitrarily. On appeal, the decision was reversed and remanded on the grounds that the regulation was content-neutral, but that Respondents had failed to show that the regulation was narrowly tailored to avoid abridging the First Amendment. That a public forum was involved was undisputed. The appeals' court agonized, however, over the content-neutrality doctrine, but concluded that there must be direct evidence, in the record, to show arbitrary conduct, rather than testimony of what the Administrator could or would do, under the challenged rule.

Petitioners alleged that the Administrator's interpretation of the rule, as well as conduct, was critical to determining if the rule was content-neutral, that the arbitrary airing and yanking of the program was indicia of arbitrary conduct, that the protracted delay in airing the program showed arbitrary conduct and that the rule necessarily caused content of the program to be considered as part of a determination of what was 51% local or not. Petitioners alleged that lack of guidelines or limits on the Administrator's discretion, coupled with unrestrained waiver power, supported a finding that the fee was unconstitutional and that the rule was facially invalid for not having been applied in a content-neutral manner. Petitioners averred that the potential for abuse was sufficient for the court to strike down the offending measure.

The appeals' court declined to consider equal protection and other arguments on the grounds that they were not raised below. Petitioners claimed that the arguments were

raised below, were necessarily part of a facial challenge to the rule and were properly before the court on appeal, as well as *de novo.*

The case is timely brought here to redress conflict with relevant decisions of this Court.

REASONS FOR GRANTING THE PETITION

This case commences at a time, happily, when First Amendment rights are being deepened, not restricted. As the new and evolving medium of public-access cable television becomes an important vehicle for speech, the impact of long-standing Supreme Court precedent, such as *Murdock v. Pennsylvania*,[1] 319 U.S. 105 (1943), which holds that there can be no fee for exercise of a constitutional right, comes into play. Also, the Cable Act, by which Congress has made clear provision for public-access to be open as widely as possible for the dissemination of the most amount of views, to all comers.[2] And, *Forsyth Coun-*

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[1] *See also Jones v. Opelika*, 319 U.S. 103 (1943) (no license fee or tax upon exercise of the First Amendment); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (striking down $1.00 license fee).

[2] *Cable Television Policy Act of 1984*, 47 USC §521 *et seq.* The intent of the Act, by its own terms, is *to assure and encourage the widest possible diversity* in cable communications, 47 USC §521(4).

ty, Georgia v. The Nationalist Movement, 505 U.S. 123 (1992), under which strict scrutiny is to be given to fee-rules which, although content-neutral[3] on their face, are susceptible to potential abuse, as here, and are, therefore, facially invalid.

PROPOSITION I

AN ADMINISTRATOR'S INTERPRETATION OF A RULE WHICH IMPOSES A FEE FOR EXERCISE OF A FIRST AMENDMENT RIGHT SHOULD BE CONSIDERED IN A FACIAL CHALLENGE TO THE RULE.

The Fifth Circuit has imposed a weighty and unwarranted restriction upon the content-neutrality doctrine enunciated by this Court, which cripples, if not emasculates, the doctrine entirely. The kind of "smoking gun" test, which requires more than an Administrator's interpretation of a facially-challenged fee rule -- but rather evidence, of record, of arbitrary conduct -- would seriously constrict free speech protections in public-access broadcasting, as well as generally in public affairs.

Note, also, the "profound national commitment" to "uninhibited, robust and wide-open" discussion of public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] By way of caveat, this brief-writer disagrees with the content-neutrality doctrine.

> In evaluating petitioner's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it.

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 131 (1992).

The Fifth Circuit correctly noted that, under the content-neutrality doctrine of this Court, litigation would end and the challenged fee rule would be struck down as facially invalid if arbitrary conduct were found to have been engaged in by the state actors. The District Court refused to apply the rule, at all, saying that "there is simply no evidence in the record" to show arbitrary conduct. It was seeking a "smoking gun."

The Fifth Circuit, however, delved deeper into statements by the Administrator of the fee rule that he would apply the measure in an arbitrary manner, putting non-local individuals, filming in distant cities, on the air, while banning Petitioners on the grounds of "non-local" production. But the Fifth Circuit, ignoring the potentiality[4] of the regu-

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[4] *See Forsyth County*, 505 U.S. at 132. The test set out by this Court is that arbitrary application of a government regulation is

> *inherently* inconsistent with a valid time, place and manner regulation because such discretion has the *potential* for becoming a means of suppressing a particular point of view [emphasis added].

lation for abuse, concluded that what a regulator could do and what he said he would do fell short. It, therefore, repaired to the lesser, "reasonableness" standard[5] -- holding that the challenged rule was content neutral -- and reversed and remanded on the theory that there was no showing by Respondents that the rule was narrowly tailored.

In essence, the Fifth Circuit shunted aside the potentiality for abuse and unlawful conduct, legitimizing the "smoking gun" theory of the District Court.

However, as this Court has frequently noted, regulators are wont to engage in ruses and deceptions in using official conduct to abridge constitutional rights. Various doctrines have evolved to counter such abuses, such as the "chilling effect" doctrine and precedent which considers a civil rights' litigant to represent even those not before the Court in advancing constitutional rights.

The Fifth Circuit appears to have agonized over the content-neutrality doctrine and has laid its quandary fully before us. But, one cannot expect a civil rights' litigant to employ "investigative reporters" to infiltrate the public-access studios with hidden cameras to record the Administrator confiding: "Sure, let's keep those horrible 'white supremacists' off the air."

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[5] *But see Broadrick v. Oklahoma,* 413 U.S. 601 (1973) ("reasonable" time, place and manner restrictions may not delegate standardless discretionary power to local functionaries).

When the Administrator testifies that he would broadcast Ross Perot from Dallas and Phil Gramm from Washington, without charge, but not Petitioners, the mere subterfuge of the fee rule, as a means to suppress views[6] the

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[6] See also the legislative history of the Cable Act, which created public access. *U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), p. 4668.

> [A]ccess provisions contained in this legislation are consistent with and further the goals of the First Amendment.... which will foster the availability of a "diversity of viewpoints" to the listening audience....
>
> The goal of the First Amendment is to foster "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20 (1945).
>
> > The interest in diverse sources of information is akin to, if indeed it is not the same as, the interest protected by the First Amendment....
>
> This interest has been recognized time and time again. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969), for instance, the Supreme Court observed that
>
> > [i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than

Administrator disagrees with, is exposed. The Administrator, with no necessity of recording his reasons, clearly prefers to hear what a Senator or billionaire has to say, but not a pro-majority newsman. Even though testimony was cut short by the District Court, the record is sufficient.

There are no carefully tailored guidelines to guide the Administrator's discretion. What is "local"? "Locally produced"? "Local content"? The Administrator, alone, holds the keys -- or the padlock -- to the portals of free speech. This is too much discretion to pass constitutional muster. *See e.g. Forsyth County* , 505 U.S. at 129 (too much discretion in the administrator, with no objective guidance to the administrator).

Much ado was made below of the wording of the rule, as being content neutral. But the test is, actually, the potentiality for abuse. In *Forsyth County*, the Administrator

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to countenance monopolization of that market.

> As we enter the "information age," access to telecommunications networks has become increasingly important to full participation in the political, economic, social, and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all our citizens.

U.S. Code Congressional & Administrative News, 98th Cong., Vol. 5 (1984), p. 4673.

necessarily had to take into account the content of proposed speech[7] in order to determine security measures,[8] despite his protestations that he did not consider such content.[9] He could charge or waive a fee, favoring one group over another, on his own whim.

In the instant case, the Administrator would ultimately have to consider content in order to determine if the program were "locally produced" or not. If a broadcaster

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[7] A beneficial example of when a lower court did not depart from the *Forsyth County* rule of this Court -- and the line of authority leading up to it -- is *The Nationalist Movement v. City of Boston*, No. 1:94-CV-10825 (D.C.-D.Mass.1998) (unpublished). In applying the content-neutrality doctrine, the court struck down as facially invalid an ordinance which allowed an administrator to ban expressive activity for "traffic" control. While no "discriminatory" language was found in the wording of the measure, the court concluded that the administrator was granted too much discretion and that the potential for abuse of the First Amendment was too great.

[8] *Forsyth County*, 505 U.S. at 134 (for the "necessity" rationale).

[9] *Cf. Smith v. Goguen*, 415 U.S. 566 (1974) (for the potentiality for abuse when a measure has the *potential* to be administered in an arbitrary manner). The Court noted that a protester could be charged for wearing a flag on his pants, whereas a veteran seeking shelter beneath a flag would likely not be.

stated, under the "honor system," pursuant to the 51% rule, that a show was 51% filmed locally, but on the screen there were zebras gamboling 100% of the time on the plains of Africa, what was *seen* would necessarily have to carry the day over what was *said*. *See e.g. Boos v. Barry*, 485 U.S. 312, 318-391 (1988) (content necessarily had to be considered to determine legality).[10]

Petitioners are hard pressed because if the case were remanded, with a holding that the rule is content neutral, as in *The Nationalist Movement v. City of Cumming*, 913 F.2d 885, 888 (11th Cir.1990), *vacated*, 921 F.2d 1125 (11th Cir.1990), *original opinion reinstated*, 934 F.2d 1482 (11th Cir.1991), *aff'd on different issue*, 505 U.S. 123 (1992),[11] to determine "reasonableness" of the fee rule, and if the fee rule were, then, upheld, it could be said that

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[10] Also pointed and unambiguous is 47 USC §532(c)(2):

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming....

47 USC §521(4) expresses the will of Congress that "the widest possible diversity of information sources and services to the public" be assured on public-access.

[11] The ruling by the Eleventh Circuit that the challenged rule was content neutral came before this Court's ruling in *Forsyth County*, however.

the law-of-the-case prevented the content-neutrality doctrine from being asserted, again, on appeal.

A rule that has a substantial risk of eliminating certain ideas or viewpoints from the public dialogue must be considered content based and subject to strict scrutiny, *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994).

A public access program is not unlike a parade. A parade does not simply move from point to point. It necessarily has a message to convey. *See Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*, 515 U.S. 557 (1995) (for the rationale that essentially all parades carry some sort of message). Likewise, a public-access broadcast is not simply "talking heads." It necessarily carries a message.[12]

PROPOSITION II

CONDUCT OF AN ADMINISTRATOR IS RELEVANT IN DETERMINING ARBITRARY CONDUCT UNDER A FEE-RULE WHICH IMPACTS EXERCISE OF A FIRST AMENDMENT RIGHT.

This Court has not countenanced, nor should it countenance, the winnowing away of its principles and precedents. It is especially concerned that First Amendment

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[12] *See Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (regulations permitting government discrimination on the basis of content of message cannot be tolerated under the First Amendment).

rights be unshorn. The very narrow and constricting rule, put forth below, is clearly an erroneous application of the content-neutrality doctrine.

> This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.

Forsyth County, 505 U.S. at 129.

The authoritative interpretation of the fee rule by the Administrator has been noted. But the implementation, thereof, is also of record, even though the hearing was abbreviated. Facts, when shown all together, indicate a pattern of conduct which not only details abuse, but a chilling potential for abuse, which cannot stand.

Respondents, as an "electric socket" to the public-access channel, should have been active and attentive *ab initio* in getting Petitioners' program plugged in. *See Elrod v. Burns*, 427 U.S. 347 (1976) (for immediacy of speech).[13] Instead, they procrastinated and delayed, month after month, shuffling Petitioners back and forth from their legal department to the Administrator as though free speech was some sort of box of paper clips.

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[13] *See also Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) for the "heavy burden" upon regulators to justify their conduct in matters where prior restraint is imposed, as here, upon speech.

After suit was filed and litigation pending, Respondents put the program on the air, but then summarily pulled the plug, after three months, alleging non-payment of the fee which Petitioners, all along, refused to pay. Why three months and not one show? And why when a program criticizing homosexuals in the army was submitted?

The on-again-off-again treatment, sometimes waiving the rule, sometimes attempting to enforce it, is plainly unconstitutionally arbitrary. *See NAACP v. Button*, 371 U.S. 415, 438 (1963) ("precision of regulation" required for constitutionally protected activity)

At the time suit was filed, Respondents were enforcing the fee rule despite the measure's clear violation of the cable franchise agreement which provided that use of the public-access channel be on a first-come, first served, nondiscriminatory basis[14], akin to the mandate of Congress.

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[14] The proper exercise of governmental authority is simply to assure the first-come, first-served priority of differing events ... seeking ... the same time, *cf. Cox v. New Hampshire*, 312 U.S. 569, 574-576 (1941).

This Court has approved the concept of a first-come, first-served system:

> Congress ... may devise ... access that ... will afford increased opportunities for the discussion of public issues ... on a first come, nondiscriminatory basis.

Columbia Broadcasting System, Inc. v. Democratic Na-

While the litigation was pending,[15] the language of the measure was amended.

In *Goguen*, the record did not have to show that a veteran actually sought shelter under a flag. The Court could see the potential for abuse clearly and, similarly, should see the abuse here, as well. The interpretations of the Administrator simply add to the panorama of abuse, unfettered discretion and arbitrary conduct which the content-neutrality doctrine was designed to strike down.

PROPOSITION III

EQUAL PROTECTION AND OTHER POINTS WERE DULY RAISED BELOW AND ARE PROPERLY BEFORE THE COURT EITHER BY WAY OF APPEAL, AS PART OF THE FACIAL CHALLENGE OR *DE NOVO*.

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tional Committee, 412 U.S. 94, 131 (1973), *cited in U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), p. 4673. The Cable Act was said to have

> secured the First Amendment right of the viewers and listeners to a diversity of information sources, *id.*

[15] The trial court initially issued summary judgment in favor of Petitioners on grounds that the franchise had been clearly violated, but changed the ruling to favor Respondents when the measure was amended after suit was filed.

It is well-settled that this Court conducts its own, independent review of First Amendment cases, *see e.g. Hurley* (appellate *de novo* consideration is without deference to the trial court). *See also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (requirement of independent appellate review is a rule of federal constitutional law; the Court has a constitutional duty to examine the whole record in First Amendment cases).

While this case can and should be decided on the ample record, at hand,[16] it should be noted that the ruling below that equal protection arguments were not raised in the trial court, is clearly erroneous.

Allegations of Vagueness Violations

Docket	**Item**
#1	Complaint, ¶46
#1	Motion for Temporary Restraining Order, §III
#3	Memorandum in Support of Motion for Temporary Restraining Order, §III

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[16] While these arguments are better referenced in any future briefing on the merits, should the Court grant the petition, the point is included to apprize the Court that there may be grounds, other than content-neutrality, pursuant to which the challenged rule might be invalidated.

#10 Memorandum in Support of Reply in Opposition to Motion for Summary Judgment, §IV

Allegations of Fourteenth Amendment violations

#1 Complaint, ¶46

#9 Reply in Opposition to Motion to Dismiss, §I, §III, ¶¶5, 7

#10 Memorandum in Support of Reply in Opposition to Motion for Summary Judgment, *Statement of the Case*

#16 Memorandum in Support of Motion for Summary Judgment, *Statement of the Case*

#17 Reply to Counterclaim, *Affirmative Defenses*, ¶4

#62 Motion to Reconsider, ¶6

#62 Affidavit in Support of Motion to Reconsider, ¶8

#63 Memorandum in Support of Motion to Reconsider, §III

These points, generally, touch upon the wording of the

regulation and the vagueness of the words,[17] such as "local" and "elsewhere" production. Also challenged are the categories of "organizations" and "individuals," upon a sliding fee scale, with "organizations" required to pay more. No justification is given by Respondents, of record, other than the Administrator's view that "organizations" are presumed to have more money. Particularly egregious is the classification which allows for those who can pay, being able to speak, as opposed to those who cannot pay, who may not speak, with no exception for the indigent.[18]

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[17] The Void-For-Vagueness Doctrine rests upon the due process clause of the Fifth and Fourteenth Amendment and applies to regulations which lack clarity and precision, *see The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67 (1960). The Overbreadth Doctrine applies primarily in the area of First Amendment rights, *see e.g. City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-799 (1984).

[18] Creating status for would-be speakers based on ability to pay is unconstitutional, *cf. Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 123 (1973) (domination of the public agenda by the wealthy condemned). *See also* legislative history of the Cable Act, *U.S. Code Congressional & Administrative News*, 98th Cong., Vol. 5 (1984), pp. 4672-73:

> Public access channels available under H.R. 4103 would be available to all, poor and wealthy alike, thereby minimizing the Court's fear in *Democratic National Committee* of domination of the media by

Petitioners' attempts to present a full record were cut short by the trial court. The summary judgment procedure, determined by the trial court, did not allow for a more expansive delineation of equal protection, void-for-vagueness and overbreadth arguments. However, the raising of the points seems to be sufficient either as part of the appeal, as an adjunct to the facial-challenge proposition or *de novo*.

> Respondent mounts a facial challenge to the ... ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation.

Forsyth County, 505 U.S. at 129 (implying that an overbreadth challenge is part and parcel of a facial challenge).

CONCLUSION

This is an important free-speech case, in which the lower courts have departed significantly from the content-neutrality doctrine clearly laid down by this Court. This case has broad implications for First Amendment rights, particularly in emerging public-access cable-television broadcasting in the "information age."

If state actors are permitted to constrict this Court's clear mandate that a regulation's potential for abuse of the First Amendment will be considered in any facial challenge -- as well as the interpretation of such regulation by word or deed of the regulator -- there will be virtually no

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the wealthy.

end to the schemes, diversions and ruses to thwart Congress' clear intent that public-access broadcasting be wide-open and robust, on a first-come, first-served basis.

If unbridled discretion is permitted to creep back into the marketplace of ideas, so that those regulating public-access programming may consider -- actually or necessarily -- the content of speech, the profound national commitment to wide open and robust discussion of public affairs will take a galling step backward.

If a charge is allowed to be placed upon those seeking to exercise free speech over the public-access channels, with no compelling governmental reason for such a fee, the First Amendment will become more of a privilege than a right, and evermore ineffective, especially for the poor.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RICHARD BARRETT
Counsel of Record

Richard Barrett
PO Box 2050
Learned MS 39154
(601) 885-2288

Attorney for Petitioners

Appendix 1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20031

ROBERT HORTON, NATIONALIST
TELEVISION, a Texas Non-Profit Corporation;
and BARRY HACKNEY,

Plaintiffs-Appellants,

versus

CITY OF HOUSTON, TEXAS and
ACCESS HOUSTON CABLE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

June 18, 1999

Before KING, Chief Judge, JOLLY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appendix 2

At issue in this appeal is whether Access Houston Cable Corporation ("Access"), a "PEG" cable channel,[1] can, consistent with the First Amendment, charge a fee to cable-cast programs not "locally produced" in and around Houston, Texas. We conclude that Access Houston's fee requirement is a content-neutral regulation which implements a significant governmental interest in promoting localism, but Access has not met its burden of proving that the fee is narrowly tailored to serve that interest. We therefore reverse the grant of summary judgment and remand for further proceedings.

BACKGROUND

The City of Houston granted a cable franchise to Warner Cable Communications ("Warner") that required Warner to designate at least four PEG channels for the city's benefit.[2] Houston then engaged Access to manage the channels, including a public access channel.[3] Access is not a typical cable channel: It does not operate for profit, it does not have an editorial board that selects program-

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[1] PEG channels are those reserved for public, educational or governmental use by the municipal franchise agreement with a cable operator. See 47 U.S.C. § 531 and 531(e).

[2] Under the franchise agreement, the City of Houston can require Warner to make available an additional four cable channels if certain conditions are met.

[3] That Access is a state actor is undisputed on appeal.

ming for cable-cast, and it does not sell advertising space. Instead, Access's programming space is open to any individual or organization who wishes to televise constitutionally protected speech. Access neither produces programs nor broadcasts commercial programs. To promote the original programming on which it relies, Access offers (for a nominal fee) video cameras and other production equipment, training workshops, studio space and other services.

Access touts that it will broadcast any non-commercial program as long as the program engages in constitutionally protected speech and complies with various rules designed to allocate air time among the programmers. Access employees do not pre-screen submitted programs to determine whether they comply with the non-commercial speech rule or the First Amendment; instead, Access requires program providers to accept liability for the content of their programs by signing a Program Contract before the program will be aired.[4]

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[4] Pursuant to Rule 2.A-5, all program providers who wish to schedule broadcast time with Access must first sign a Program Contract.

The Rule states that,

> 2.A-5 PROGRAM CONTRACT AND RESPONSIBILITY: Before access programs are scheduled for cable-cast, the access program provider must sign a Program Contract which holds the program provider liable for content of the program and pay all applicable fees. In signing the Program Contract,

At the time this dispute arose, Access sought to encourage programs "that reflect[] the activities, culture, concerns, and interests of the citizens of Houston and []promote a free exchange of ideas, information and understanding."[5] To fulfill its contractual obligation with the City, Access's Board of Directors adopted a rule, which has been in effect since 1988, providing for "locally produced" programs to be broadcast free of charge. To qualify as a "locally produced program," at least 50 percent of the program must have been shot within the Houston Standard Metropolitan Statistical Area. Programs that do not comply with the "locally produced" rule are assessed a fee: individuals who submit non-local programs must pay $75 for each hour of programming, while organizations are charged $100 per hour. Because Access does not prescreen submitted programs, it cannot initially determine whether a program complies with the rule. Access relies on each program provider voluntarily to disclose whether the submitted program was locally produced.

In March 1992, Appellant Nationalist Television

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the program provider agrees in writing that his or her program does not include any form of "constitutionally unprotected speech."

[5] Access Houston ByLaws Art. III (1986). After the events in this case, in its 1994 contract with the City of Houston, the requirement to support localism became more explicit: "a minimum of 51 percent of the total hours programmed on the Access channel shall be locally produced in the Houston metropolitan area."

("N-TV"), as agent for Houston resident appellant Robert Horton, submitted a 30-minute program for cable-cast entitled *Airlink*.[6] After a month had passed and the program had not been cable-cast, N-TV wrote to the Houston City Attorney's office demanding that Access immediately cable-cast *Airlink*. The City Attorney replied that Access operates independently of the City and that Houston cannot require Access to broadcast *Airlink*. In addition, N-TV was informed that, according to Access, N-TV had not complied with the procedural requirements necessary to broadcast *Airlink* and that N-TV should directly contact Access to complete the application process. Despite this notification and the receipt of a complete copy of the Access procedural rules, N-TV continued to complain to the Houston City Attorney's Office rather than to Access. Months later, N-TV turned to Access and learned that it, like all other program providers, must sign a Program Contract. Two months more passed, N-TV finally signed the requested Program Contract, and Access began cable-casting *Airlink*.

Airlink was produced at a studio in Mississippi and did not qualify as a "locally produced program." N-TV was thus required to pay the $100 cable-cast fee.[7] N-TV re-

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[6] The content of *Airlink* is described as "pro-majority" in some portions of the record and "white supremacist" in other parts of the record.

[7] Since *Airlink* was a half-hour program, the $100 fee was prorated, making N-TV liable for $50 per cable-cast.

fused to pay, arguing that the fee violated the First Amendment, and filed the present lawsuit seeking a declaratory judgment, a temporary restraining order, and a permanent injunction. Ironically, Access began regularly cablecasting *Airlink* just after the suit was filed, from December 1992 through February 1993. When N-TV refused to pay fees for the three months of programming that had been aired, *Airlink* was canceled.

Immediately after appellants filed suit, the district court held a hearing to rule on appellants' request for a temporary restraining order ("TRO hearing"). The district court denied the request and offered to set the case for trial. Each party then moved for summary judgment. The court held in favor of Access and the city, ruling that the fee requirement is a facially valid, content-neutral regulation incidental to free speech under the test articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968), and that the appellants failed to raise a genuine issue of material fact regarding whether the fee requirement was unconstitutional as applied.

STANDARD OF REVIEW

The standard of review of a summary judgment at the appellate level is *de novo*. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S. Ct. 2548 (1986).

Under this standard, all fact questions must be viewed in the light most favorable to the non-moving party, and questions of law are reviewed *de novo*. *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).

DISCUSSION

N-TV scatter-guns its First Amendment arguments against the Access fee for non-locally-produced programs. Attacking the fees both facially and as applied, N-TV asserts that the fee rule grants overbroad, arbitrary discretion to Access administrators, encouraging content-based discrimination against programs. More fundamentally, N-TV contends that the fee regulation is an impermissible content-based rule. N-TV also levels equal protection, overbreadth and vagueness challenges to the fees, but these arguments were not raised in the district court and will not be considered here.

Fitting the PEG channels into the familiar holes of First Amendment jurisprudence is not easy. The premise of our discussion is that programmers have some kind of First Amendment rights to share the podium at a PEG local access channel set aside by Houston's cable franchise contract. The Supreme Court has implied that all of the participants in cable television-programmers, cable operators, TV broadcasters, PEG channels -- enjoy free speech rights, but the limits of those competing and potentially conflicting rights are far from clear. *See generally*, Pluralism on the Bench: Understanding *Denver Area Educational Telecommunications Consortium v. FCC*, 97 Colum. L. Rev. 1182 (1997).

The first conundrum relates to the dubious status of PEG channels, which municipalities have the authority to set aside in their cable franchise agreements with cable operators. *See* 47 U.S.C. § 531(a). In the "must-carry" case, the Supreme Court upheld a federal law requiring cable operators to make available transmission space for local TV broadcasters. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 114 S. Ct. 2445 (1994). The Court concluded that the "must-carry" provisions are a content-neutral regulation designed, not to force a particular type of speech upon cable operators, but to further the non-speech-related goals of protecting local broadcasters and assuring free TV access to citizens who lack cable connections. The four dissenters in *Turner* essentially stated, however, that forced set-aside of PEG channels is a content-related imposition on cable operators, *Turner* 512 U.S. at 675, 114 S. Ct. at 2476 (O'Conner, J., concurring in part and dissenting in part), and the majority decision offers no rationale opposed to such a conclusion.[8] Justice Thomas reiterated the PEG constitutionality problem and scholarly discussions of it in the Court's most recent cable decision, only to note that the issue had not been raised. *See Denver Area Educ. Telecomm. Consortium v. FCC*, ___ U.S. ___, 116 S. Ct. 2374 (1996). The ultimate fate of PEGs, including Houston's local access

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[8] Indeed, the majority emphasized that neither the must-carry rule nor laws and rules presently applicable to broadcasting (*e.g.* on non-commercial stations) directs the content of the programs. *Turner*, 512 U.S. at 649-651, 114 S. Ct. at 2462-63.

channel, remains in doubt, but is not to be decided in this case.

The second conundrum arises from the implicit concession of Access that the local access channel represents a government-owned designated public forum. Nevertheless, the Supreme Court has cautioned that "the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting." *Arkansas Educ. Television Comm. v. Forbes*, __ U.S. __, 118 S. Ct. 1633, at 1639 (1998). In a later cable regulation case, seven justices of the Court either rejected or declined to consider Justice Kennedy's assertion that a local access channel is a public forum available to citizens under the most exacting constitutional standards. *Compare Denver Area*, ___ U.S. at ___, 116 S. Ct. at 2404-05 (Kennedy, J., concurring in part and dissenting in part), *with id.* ___ U.S. at ___, 116 S. Ct. at 2388-89 (Breyer, J.) (refusing to consider public forum doctrine), *and id.* ___ U.S. at ____, 116 S. Ct. at 2426-28 (Thomas, J., concurring in the judgment in part and dissenting in part) (PEG channel is not a public forum). If one were either to press the analogy between Access and a classic public television station or to reject the public forum doctrine for local access channels, then Access would enjoy virtually unfettered programming discretion. Access does not request such latitude, however, so the arguments that Access is not a public forum or is a limited public forum are not before us.

The consequence, for First Amendment purposes, of ascribing particular forum (or non-forum) characteristics to Access lies in the strictness of legal scrutiny that will be

applied to Access's fee regulation. Access contends that the regulation is subject to "intermediate scrutiny" because it has nothing to do with the content of programmers' speech. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459. N-TV argues and Access concedes that were the regulation content-related, it would be subject to strict scrutiny. *Id.* And this dichotomy of regulations has been developed to govern what may be done to limit speech in either a traditional public forum or a designated public forum.[9] *See* 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 20.47 at 310-11 (2d Ed. 1992). Although it is impossible to state whether a local access channel should be analyzed by reference to the public forum doctrines, the dichotomy of standards seems to apply to broadcast regulations.

The nub of the parties' disagreement turns upon whether the fee charged for non-locally produced programs is content-neutral, or, as N-TV would have it, a ruse for influencing the content of programs that will be cable-cast.

The Supreme Court has observed that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459. Regulations that "by their terms distinguish favored speech from disfavored speech on the

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[9] If Access were, instead, a limited public forum or a nonpublic forum it would be permitted to place reasonable restrictions on the speech of programmers. *See Forbes*, ___ U.S. at ___, 118 S. Ct. at 1640-42. But it plainly does not fit in these categories.

basis of ideas or views expressed are content based." *Id.* 512 U.S. at 643, 114 S. Ct. at 2459. Thus, a rule that is applied because of disagreement with a message presented or a rule that has a substantial risk of eliminating certain ideas or viewpoints from the public dialogue are content-based. *See id.* 512 U.S. at 642, 114 S. Ct. at 2459; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S. Ct. 3065, 3070 (1984). If, on the other hand, the regulation is justified without reference to the content of the speech or serves purposes unrelated to the content, it is a content-neutral regulation, even if it has an incidental effect on some speakers or messages but not others. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); *Boos v. Barry*, 485 U.S. 312, 320, 108 S. Ct. 1157, 1163 (1988). Finally, this court has noted that government regulations that apply evenhandedly to all speakers weigh in favor of finding content-neutrality. *See International Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989).

We conclude that Access's fee rule is content-neutral because the rule does not, by its terms, distinguish between favored speech and disfavored speech. Access does not examine the content or message of submitted programs in determining whether to impose a fee. *Compare Frisby v. Schultz,* 487 U.S. at 474, 481-82, 108 S. Ct. 2495, at 2501 (1988) (finding that a municipal ordinance prohibiting all picketing near a residence was content-neutral because government did not have to look at the content to determine where picketers can demonstrate), *with Boos*, 485 U.S. 312, at 318-19, 108 S. Ct. 1157, at 1162 (1988) (find-

ing that an ordinance prohibiting demonstrations in front of foreign embassies that are critical of the foreign government was content based because government necessarily had to review content to determine the legality of the demonstration). Access's fee regulation is an evenhanded charge on all providers submitting non-locally-produced programming, regardless of the content or viewpoint contained in the program. In addition, the fee rule can be justified without referring to the content of any of the submitted programs. *See Ward*, 491 U.S. at 791, 109 S. Ct. at 2754. As discussed *infra*, Access asserts that the fee rule promotes local ideas and debate and helps fund equipment and training for local producers and the cost of Access's operations. *See id.; Boos,* 485 U.S. at 320, 108 S. Ct. at 1163. Finally, we rely on a Seventh Circuit case that upheld as content-neutral, albeit before *Turner*, a Chicago rule requiring locally-produced programs. *Chicago Cable Comm. v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989).

To the extent that Access's fee rule unabashedly prefers locally-produced programs, we recognize that it is not unassailable. The dissenters in *Turner* criticized legislative preferences for "diversity of viewpoints, for localism, for educational programming . . ." as content-based regulations. *Turner*, 512 U.S. at 675, 114 S. Ct. at 2476. They noted that no matter how praise-worthy the objectives, government may not favor one set of speakers over another. *See id.* 512 U.S. at 677-78, 114 S. Ct. at 2476-77. Only a four-member plurality in *Turner* directly responded to arguments concerning localism, but the majority opinions emphasized the purely economic reasons why Con-

gress wanted to support local broadcasters by requiring "must-carry" by cable operators. The non-speech-related basis for the rule made it content-neutral. *See id.* 512 U.S. at 645, 114 S. Ct. at 2461.

In this case, one may argue that while the interest in "localism" is furthered by the fee rule, not only is there no direct content regulation, but the fee compensates the citizens of Houston in a small way for the costs incurred when non-locally-produced programs air on the Access channel. The fee subsidizes Access and substitutes for the local resources that could otherwise be utilized to produce programs. The fee thus has an independent economic basis more closely analogous to the content-neutral must-carry rule than to a purely content-related localism preference. We therefore conclude that the non-locally-produced fee rule is content-neutral.

The standard for evaluating the constitutionality of content-neutral regulations was articulated in *O'Brien*:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679. As Access's

fee regulation is on balance a content-neutral rule, the third prong of the *O'Brien* test has been satisfied, and, germane to the first prong, Houston has the power to sponsor a public access cable channel and raise revenues for its operation.

Still at issue are the second and fourth *O'Brien* standards. "Even a content-neutral regulation of speech on a public forum must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication." *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992). The burden is on Access to show that the fee requirement is narrowly tailored to protect the identified interests. See *id.* at 119. A regulation is narrowly tailored "when it does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 118 (quoting *Ward*, 491 U.S. at 799, 109 S. Ct. at 2758). In other words, Access must show that the fee requirement promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *See United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906 (1985); *Chicago Cable*, 879 F.2d at 1550.

Access argues that the fee requirement promotes the substantial governmental interest in "localism." According to Access, the fee encourages residents to produce programs featuring topics of local concern which in turn enhances community self-expression and fosters direct communication among residents. Since a portion of the revenues derived from Houston residents' cable bills funds Access's operations, residents should not have to subsidize

non-locally-produced programs.[10] Similarly, Access urges that the revenues generated from the fee train local producers, purchase production equipment, and fund the general operations of Access. Finally, encouraging residents to produce local programming increases job opportunities and career development of Houston residents. We agree -- and N-TV does not dispute[11] -- that the promotion of "localism" in this context is an important governmental interest. *See Chicago Cable*, 879 F.2d at 1549-50.

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[10] At the TRO hearing, the executive director for Access expanded on this theme, testifying that,

> the residents of the City of Houston, through their cable bills, underwrote the costs of the facilitation that our organization provides of putting the programs together, scheduling them and putting them on the cable system. We've never had a problem with where programs come from in terms of content. We frankly don't care about what the content is. What we were concerned about was it seemed unfair to us that the residents of City of Houston should subsidize programs that were from somewhere else and that, if someone wished to use the facilities, that they should contribute to sustaining the organization that had to help facilitate the users of all the programs on the channels.

[11] At oral argument, N-TV agreed that Houston has a substantial interest in promoting localism.

That Access's asserted interests are substantial in the abstract does not mean, however, that the fee regulation fulfills them and is narrowly tailored to protect those interests. The fee rule will be considered narrowly tailored if Access can demonstrate that it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799, 109 S. Ct. at 2758. According to Access's rules, "locally produced programs" are aired free of charge, while "programs produced elsewhere" are charged either $75 or $100 per hour. Access defines local programming as "[a]ny program submitted for cable-cast containing program material of which fifty (50) percent or greater was shot" within the Houston Standard Metropolitan Statistical Area.

Access has failed to demonstrate narrow tailoring of the fee rule as a matter of law. It has not shown that, absent the fee charged to providers of non-local programs, its interest in promoting localism "would be achieved less effectively." *Albertini*, 472 U.S. at 689, 105 S. Ct. at 2906. Access has not provided any evidence linking the amount charged to non-local producers and the promotion of localism. More precisely, Access has not shown the amount of revenue generated from the fee, the number of providers who have been charged the fee, or whether the fees have actually helped purchase equipment, train producers, enhance community self-expression, or offset amounts underwritten by Houston cable subscribers. Access acknowledged there is no scarcity of time available for programs, so the fee plays no role in rationing airtime favorably to locally produced programs.

Access's general fee schedule demonstrates the lack of correlation between the amount charged to non-locally produced programs and its stated justification for imposing a fee. Access heavily subsidizes most of the services and equipment it offers to the public. Next to each item listed on the general fee schedule, Access lists the cost of the item, the amount subsidized by Access, and the resulting net cost to the producer.[12] Notably, however, the fees charged to program providers for cable-casting their programs are not itemized by actual cost, amount subsidized, and net cost to provider. The general fee schedule merely states that Access airs locally produced programs free of charge, while programs produced elsewhere are charged either $75 or $100 per hour, depending on whether the provider is an individual or organization. Not only is there no evidence how much of the fee charged for non-locally-produced programs compensates Access for its cable-casting costs of those programs, but Access's executive director testified that he had recommended abolition of the fee to the Board of Directors. The inescapable conclusion is that the fee serves no measurable purpose.

Because Access has not met its summary judgment burden to sustain the fee, this case must be reversed and

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[12] For example, the actual cost of renting a "Video-Mobile Portable Kit" is $250; however, Access pays $190 of the cost via a grant, leaving the producer liable for only $60. *See Access Houston Cable Corporation's Objections to Proposed Order Granting Summary Judgment*, Exhibit D (fee schedule effective May 19, 1988).

remanded. *See Turner,* 512 U.S. at 667-68, 114 S. Ct. at 2471-72 (reversed and remanded for further factual development). On remand, Access should prove how much revenue accrues from the fee for non-locally-produced programs, as well as the purposes for which it uses the revenue. If the revenue is minimal -- that is, if it fails to ration scare airtime, to reimburse Access's costs of airing non-locally-produced programs, or to make any realistic dent in the costs borne by cable subscribers for the production facilities -- then the district court may conclude that the fee suppresses protected speech without providing any asserted benefits.

Further judicial efforts would be avoided, however, if we accept N-TV's alternative argument that the fee rule confers excessive discretion upon Access's administrator and permits content-based discrimination. According to N-TV, Access's own interpretation of the fee rule undermines the argument that it is narrowly tailored. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131, 112 S. Ct. 2395, 2402 (1992) (courts should consider the government's interpretation of a challenged regulation when addressing facial challenges). In *Forsyth County*, the Supreme Court addressed whether a county could constitutionally charge a fee to speakers who wished to hold a rally in a traditional public forum. *See id.* 505 U.S. at 129, 112 S. Ct. at 2400. The Court struck down the ordinance because it vested too much discretion in the county administrator; the administrator could, without objective guidance, determine how much or whether to charge the demonstrators a permit fee of up to $1,000. *See id.* 505 U.S. at 132-33, 112 S. Ct. at 2402-03. In the present case, the Ex-

ecutive Director of Access felt that he could independently determine whether to charge a fee for certain non-locally-produced programs. During the TRO hearing, the following exchange occurred between Appellants' attorney and Access's Executive Director:

Question: What about a guy that stopped by the other day and just happened to pick up some of your material and the receptionist was there and I said, "You know, what if somebody wanted to go up and get an interview in Dallas with Ross Perot, shoot it up there" and she said, "That will be all right?" Would that be okay with you?

Answer: It would be okay with me.

Question: No charge for that?

Answer: No charge.

Question: Okay. Now, just assume for a moment that here is a tape and we're showing it and there is Senator Gramm. He's seated at a desk. There's books behind him. And he's sitting there talking about taxes. Everybody is concerned about them these days. Any problem putting that on?

Answer: No.

Question: Okay. Now, let's say that it's on the air

and one of your staff comes in and says "Mr. Cantrell, you know, I've been in Senator Gramm's office in Washington and I recognize those books. That was filmed in his office in Washington." No real problem, though?

Answer: No real problem.

Other similar exchanges occurred during the TRO hearing, each one suggesting that Access's administrator could, at his discretion, make special exceptions to the fee rule depending upon the circumstances presented.[13] The discretion

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[13] For instance, in another exchange, Access's Executive Director testified as follows:

Counsel: Let's say that Mr. Horton comes into your studio and he produces a show right there in your studio every week, free. He goes to Mississippi. He's over there visiting the headquarters [of N-TV] and everything and the poor fellow is in a car wreck and he broke his leg and he calls you up and says, "I can't get back to Houston. I'm going to have to shoot this from the hospital bed in Jackson" and he sends you the tape. Is he going to have to pay for that?

Answer: Under the Current rules, that would

afforded the Executive Director is highlighted by contrasting the hypothetical above with one presented to him later during the TRO hearing:

Question: [Suppose] [h]e's got a 30-minute show. He comes so close. for 14 minutes he shows the Houston skyline. Would you let him slide on that without having to pay?

Answer: Like I say, we would -- that would be a good issue to discuss in the grievance procedure.

Question: You might let it slide?

Answer: Well, I don't think I would let it slide. But if it came up, I think it would be something worth discussing with the board.

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be the case.

Counsel: Would you waive that in this case?

Answer: Would I waive it?

Counsel: Yes

Answer: In the grievance procedure, I would recommend that we waive it. I would probably take it upon myself to waive it.

Access's response to this troubling amount of apparently unguided discretion is that N-TV presented no actual evidence that the fee had been discriminatorily imposed. We agree that, in light of the express objectivity of the rule, a facial challenge based on standardless discretion lacks merit. The rule, unlike the sliding-scale fee in Forsyth, unequivocally identifies the programs to which it applies and simply does not justify the latitude which the Executive Director hypothesized. Further, lacking any proof that the fee was ever administered discriminatorily to suppress disfavored speech, N-TV's as-applied challenge must fail.

CONCLUSION

Much is uncertain about the scope of First Amendment benefits and burdens in the cable industry. The directions presently available to us from the Supreme Court appear to require a standard less than that of strict scrutiny for Access's non-locally-produced fee rule, but they also require attention to the details of intermediate scrutiny. Regulations like this one which burden protected speech are not to be rubber-stamped. Based on the foregoing discussion, the case must be reversed and remanded for further factual development.

REVERSED and REMANDED.

Appendix 23

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20031

D.C. Docket No. H-92-CV-3451

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Plaintiffs-Appellants,

v.

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, Chief Judge, JOLLY, and JONES, Circuit Judges.

Appendix 24

JUDGMENT

This cause came to be heard on the record on appeal and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: July 27, 1999.

Appendix 25

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20031

ROBERT HORTON, NATIONALIST TELEVISION, a Texas Non-Profit Corporation; and BARRY HACKNEY,

Plaintiffs-Appellants,

v.

CITY OF HOUSTON, TEXAS and ACCESS HOUSTON CABLE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before KING, Chief Judge, JOLLY, and JONES, Circuit Judges.

Appendix 26

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

EDITH H. JONES
United States Circuit Judge

July 19, 1999

Appendix 27

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT HORTON, BARRY HACKNEY,
and NATIONALIST TELEVISION,
a subsidiary of THE NATIONALIST
MOVEMENT, a Texas
Nonprofit Corporation,

Plaintiffs,

V.

CITY OF HOUSTON, TEXAS,
a Texas municipal corporation,
and ACCESS HOUSTON
CABLE CORPORATION, a
Texas corporation,

Defendants.

CIVIL ACTION NO. H-92-3451

Appendix 28

MEMORANDUM OPINION

In a previous order, the Court announced its intention to grant summary judgment in favor of Plaintiffs Robert Horton and Nationalist Television. (Docket entry #46). Defendants, the City of Houston and Access Houston Cable Corporation ("Access Houston"), have had the opportunity to respond. In this opinion, the Court first finds that the City of Houston is not legally responsible for Access Houston's decision to impose fees and, therefore, is not liable to Plaintiffs for any constitutional violation. Second, the Court concludes that it cannot grant summary judgment on either of the nonconstitutional grounds: (1) that the imposition of mandatory fees was an *ultra vires* act, or (2) that Access Houston violated the Cable Communications Policy Act. Third, the Court is of the opinion that the Plaintiffs' motion for summary judgment on First Amendment grounds should be DENIED because the fee rule is content neutral and survives a facial constitutional challenge under intermediate scrutiny.

Finally, as the Court finds that there are no genuine issues of material fact, the Court will GRANT Defendant Access Houston's motion for summary judgment.

1. Factual and Regulatory Background

Robert Horton is a Houston resident who seeks to cablecast a half-hour weekly program called *Airlink* over Houston cable television channels dedicated to "public, educational, and governmental programming." ("PEG chan-

nels").[1] Defendant Access Houston is a corporation chartered by Defendant City of Houston for the sole purpose of operating the PEG, or "public access' channels on all cable systems in Houston. *Airlink* is produced in Mississippi by Plaintiff Nationalist Television, a subsidiary of the Nationalist Movement.[2] The content of the *Airlink* show is described variously as "pro-majority" by Plaintiffs and "white supremacist" elsewhere in the record. *See, e.g.*, Dkt. #4, Ex. X. Plaintiffs allege that Defendants have violated their First Amendment right of free speech by charging them $100.00 per hour to cablecast programming produced outside the Houston Standard Metropolitan Statistical Area. ("SMSA"). Over the course of a calendar year, this mandatory fee would require Nationalist Television to pay roughly $2,600.00 to Access Houston to cablecast the weekly *Airlink* show.

City of Houston Ordinance 93-156, the current franchise agreement between the City of Houston and Warner

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[1] Barry Hackney was joined by Court order as an additional plaintiff on October 9, 1997. He, like Plaintiff Horton, is a member of the Nationalist Movement who seeks the cablecast of *Airlink*.

[2] Plaintiff Nationalist Television, a subsidiary of The Nationalist Movement, a Texas nonprofit corporation, was substituted by Court order on October 9, 1997 for the prior Nationalist Television entity (a subsidiary of The Nationalist Movement, a Mississippi nonprofit corporation).

Cable Communications,[3] describes in Exhibit B various policies and procedures related to public access programming on the Warner Cable system. One subsection of these Access Policies and Procedures specifies:

> G. Production of programming by organizations within the City of Houston will be encouraged. Programming by organizations within the City shall be given scheduling preference over programs produced outside the City.
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> In recognition that the Public, Educational, and Government Access channels are primarily intended to benefit the Houston community by encouraging the production of programming that has local significance, the majority (51% of total hours available which shall be calculated by dividing the total number of hours of local programming on all Access Channels by the total number of hours of programming), excluding character generated programming, shall be produced by individuals, institutions or organizations from within the City of Houston. An exception may be made for Educational programming that meets community needs and that is not available from local producers if such programming is pre-approved and submitted by a local institution or organization. Such exceptions may not be made for more than

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[3] Warner Cable is one of several franchisees authorized by the City of Houston to cablecast programming to cable subscribers.

5% of total hours available as calculated above.

Similarly, the 1994 contract between the City of Houston and Access Houston contains the following requirements:

> 2.03. Local Programming. (a) By the end of the first Contract Year, and for all succeeding Contract Years, Access Houston shall cablecast a minimum of 18 hours per day , of eligible programming, excluding character-generated programming. By the end of the second Contract Year, and for all succeeding Contract Years, a minimum of 51 percent of the total hours programmed on the Access Channel shall be locally produced in the Houston metropolitan area.
>
> (b) Access Houston shall make available a minimum of 61 hours per week of community interest programming developed by community groups, organizations, and other local institutions.
> ...
>
> Policies and Procedures shall be established by Access Houston which at a minimum should include the following: ...
>
> 7. Production of programming by organizations within the City of Houston will be encouraged. Programming within the City shall be given scheduling preference over programs produced outside the City.

The Plaintiffs do not challenge Houston's strict PEG local content requirements in any manner. Nor do Plaintiffs appear to object in principle to the notion that Houston should have *some* policy to promote "localism," ensuring that a fair portion of PEG programming is produced locally and responsive to local interests. Rather, Plaintiffs' concern is with Access Houston Cable Corporation's handling of the forty-nine percent (49%) of programming which, according to the Houston regulations, may be produced *either* in Houston or elsewhere.[4] Plaintiffs' concern is that while Access Houston will cablecast all locally produced programming without charge (so long as the programming satisfies certain technical requirements for compatibility with cable transmission systems, it is not obscene, libelous or otherwise illegal, and it meets certain other criteria spelled out in the Houston franchise agreements), all non-local programming, however, may be cablecast *if and only if* the individual or organization seeking to air the programming pays an hourly fee.

The fee for non-local programming is not the only fee that Access Houston charges. It is, however, the only mandatory fee. Access Houston charges fees for training

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[4] In other words, the Houston rules establishing a minimum local content requirement only establish a "floor" for the amount of locally-produced programming that may be cablecast; the rules do not represent a "ceiling." That the Houston PEG regulations permit the cablecast of non-local programming at least some of the time indicates that "localism" is not the *exclusive* goal of the PEG channels in Houston.

classes, but these training fees and other fees are placed in a fund "to provide training to those unable to pay for it." *See* Dkt. #47, Ex. E, at I 10. In contrast, the rule concerning fees for non-local programming provides no procedure for individuals and organizations without substantial resources to apply for a waiver. Access Houston also charges fees for the use of the resources it provides to individuals and organizations for the production of PEG programming (studio and editing facilities, video cameras, and the like); however, some of the time, these resources are reserved for use without charge on a first-come, first-served basis. The reason fees are imposed at other times, Access Houston explains in its regulations, is that demand for free access to production facilities far exceeds the supply. Therefore, the usage fees for production resources, which are still well below market rates for similar facilities and equipment, only ensure preferential access to these resources; the fees are *not* an absolute precondition to the use of Access Houston's production resources.

Neither the Houston cable franchise agreements, nor any contract between the City of Houston and Access Houston, nor the Access Houston bylaws or articles of incorporation requires Access Houston to impose mandatory fees on non-local programming. The mandatory fees are solely the product of a resolution by the Access Houston Board of Directors. The Access Houston Board of Directors claims, however, that the City of Houston has impliedly authorized Access to impose mandatory access fees on non-local programming. Such authorization must be implied because there appears to be no express authorization by the city to charge a "fee" of any nature.

Access Houston's Board of Directors believes that the power to impose such a fee, and to withhold airtime as a means of coercing payment, is implicit in its power to promulgate rules and regulations. The 1994 contract between Access and the City provides:

> 2.04 Policies and procedures. In *connection with the performance of its obligations* hereunder, Access Houston shall establish, implement and enforce quality control and other procedures for programming consistent with the Policies and Procedures contained in **Exhibit A** hereto. Public Access Programming must be consistent with the goals, objectives, and the scope of services stated in this Contract throughout the Contract Term
> ...

(*italics* added). Exhibit A to the contract says nothing about user fees; concerning non-local programming, Exhibit A only specifies that local' programming shall be given preferential scheduling. Likewise, the Access Houston Bylaws specify in Article III:

> Access Houston is organized to coordinate, develop and administer all public access activities for access to those cable channels available to the City of Houston for access activities as a result of its cable franchise agreements and not reserved by the City of Houston for municipal access activities. Access Houston . . . shall act as public trustee in the administration of this public resource in the community interest. In order to ac-

complish this purpose, Access Houston shall:

...

5. Establish and administer, under the jurisdiction of the Board of Directors of Access Houston, all rules, regulations, policies and operating procedures, including training requirements, pertaining to the use and scheduling of these cable access channels;

. . .

The Bylaws also specify in Article V, Section 3 that the Board of Directors shall "[s]et policies for the operation of Access Houston and establish its general course from year to year in accordance with the purposes as outlined in Article III."

Also in Article III of Access Houston's Bylaws, Access Houston is authorized to "hire and supervise staff," "purchase materials and equipment, and supervise staff," "purchase materials and equipment," "establish, manage and operate cable access facilities, including a means of production and a means of delivery of programming to the cable system(s)," and to "provide ... the resources[5] to pro

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[5] The 1994 contract also requires "at a minimum," for the purpose of development and implementation of public participation, that Access Houston "[p]rovid[e] to local individuals, institutions and organizations, on a non-discriminatory basis, the necessary resources to produce public access programs. This includes facilities, materials, equipment and personnel." The power to condition

duce programming for the cable access channels to individuals, institutions, and organizations within the city of Houston on a non-discriminatory basis."

The Bylaws do not require that Access Houston limit itself to franchise fees as its sole funding source; rather, the Bylaws specify:

> In addition to the monies received by Access Houston from the City of Houston, the Board of Directors may seek and receive private, federal, state, county and other municipal funds for the purpose of developing and promoting cable television programming of a public and educational nature for the principal benefit of the citizens of Houston. The Board of Directors of Access Houston may also accept on behalf of Access Houston any contribution, gift bequest or other devise for general purpose(s) or for any special purpose(s) of Access Houston.

As the City points out in its briefing, the 1994 contract between the City and Access in section 2.01(v) requires Access to "[m]ake diligent efforts to secure outside funding, including soliciting contributions, to augment Public Access Payments, including without limitation solicitation

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cablecast of programming upon the payment of mandatory fees is no more implicit in the requirement to "provide resources" to the community for video production than it is implicit in the power to "purchase materials and equipment" or to 'hire and supervise staff."

of public membership subscriptions." The 1993 Warner Cable franchise agreement also specifies that Access Houston may use airtime for the purpose of conducting fundraising drives, presumably by soliciting PEG membership subscriptions from cable customers. While all of these documents expressly contemplate Access Houston conducting fundraising activities through the solicitation of voluntary contributions, none of them contain any authorization to condition cablecast of programming on the payment of mandatory user fees.

At the time this lawsuit commenced, the question concerning the propriety of the Access Houston fee for non-local programming was relatively easy to resolve. In 1979, Warner Cable entered into a franchise agreement with the City of Houston for a term of fifteen years; this agreement was adopted as a City of Houston ordinance. Hence, Access Houston was required to abide by the terms of the Warner Cable franchise agreement, if for no other reason than the requirement in section 4.1.6 of the 1986 contract between Access Houston and the City that "[Access Houston] shall comply with all laws, statutes, ordinances, decrees, requirements, orders, judgments, and regulations of governmental authorities, to the fullest extent possible where failure to do so might reasonably be expected to have an adverse material effect upon [Access Houston], its properties, or its business activities." With regard to PEG channels, the 1979 Warner Cable contract specified that "at least two channels shall be reserved for the use of the public, one of which shall have nondiscriminatory access without charge on a first come, fast serve[d] basis, and the other of which shall be reserved for use by

the city."

Therefore, when the City of Houston for-med Access Houston in 1986, and passed Access Houston's Bylaws as a city ordinance, it would have been a violation of the Warner Cable franchise agreement for the City to authorize Access Houston to charge mandatory access fees to users or to deny users cablecast access on the ground that they had not paid a fee. Thus, in 1986, and in 1988 when Access Houston implemented its mandatory fee, Access's decision represented a clear violation of the Warner Cable franchise agreement.

However. the City of Houston renewed Warner Cable's franchise agreement in 1993. In lieu of the relative pith of the 1979 franchise agreement on the subject of PEG channels, the 1993 franchise agreement contains six pages of rules concerning what may be cablecast, what must be cablecast, the technical requirements for programming, the conditions and terms upon which PEG airtime is provided, and prohibitions on the broadcast of certain forms of illegal or unprotected speech. Unlike the 1979 agreement, which provides that access to PEG airtime must be provided on a "nondiscriminatory . . . first come. first serve[d]" basis, the 1993 franchise agreement expressly requires discrimination in favor of locally produced programming in allocating airtime. The 1993 franchise agreement is absolutely silent on the question of whether access to PEG airtime must be provided "without charge," or whether charges may or must be imposed.

In response to the Court's previous order, both Access

Houston and the City of Houston have pointed out that the Warner Cable franchise agreement no longer requires PEG airtime to be provided without charge on a nondiscriminatory first-come, first-served basis. The Court expressly contemplated this possibility in footnote four of its earlier order. Because the franchise agreement has changed, the Court can no longer rely on the franchise agreement as a ground for deciding this case.

II. Analysis of Non-Constitutional Issues

The Court will address Plaintiffs' non-constitutional grounds for summary judgment first because, without exception, the federal courts must adhere to the rule that "if a case can be decided on nonconstitutional grounds, it should be." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 32647, 56 S. Ct. 466, 80 L. Ed. 688 (1936), *reh'g denied*, 297 U.S. 728, 56 S. Ct. 588, 80 L. Ed. 1011 (1936). Therefore, until these threshold questions are resolved, the Court must not decide the issue of whether Plaintiffs' First Amendment rights have been violated by a facially invalid fee rule; nor may it consider whether there is any evidence that the fee rule is unconstitutional as applied.

A. Ultra Vires

The first question presented is whether the mandatory fees Access Houston has imposed on non-local programming are *ultra vires* -- in other words, beyond the power of Access Houston. This analysis affects two determinations: (1) whether the city can be liable to Plaintiffs for constitu-

tional violations resulting from the imposition of the fees if it implicitly authorized such fees; and (2) whether Access Houston can be liable to Plaintiffs because of an *ultra vires* decision to impose fees. From its analysis of this issue, the Court concludes that (1) the City of Houston never authorized Access Houston to charge such mandatory fees and, as such, cannot be held legally responsible for any violation of Plaintiffs' rights, and (2) even if Access Houston's decision to charge mandatory fees was an *ultra vires* act, Plaintiff does not have standing to raise this argument and, therefore, it cannot be dispositive of the case.

1. The Issue of Implicit Authorization by the City of Houston

It is at best ambiguous whether the City of Houston intended the silence of the 1993 Warner Cable agreement on the question of mandatory fees to serve as an indication that Access Houston was thereby authorized to impose them. In its briefing, the City of Houston takes no such position. Only Access Houston contends that the City of Houston has provided such authorization. Such an argument is roughly analogous to the rule applied by the federal courts in interpreting statutes that, "[t]he silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked,' *see Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 975 n. 11, 103 S. Ct. 2764, 2796 n. 11, 77 L. Ed. 2d 317 (1983) (White , J., dissenting) (and cases cited therein), *see also Babbitt v. Sweet Home Chap-*

ter of Communities for a Great Oregon, 515 U.S. 687, 115 S. Ct. 2407 (1995), and is not without some persuasive force. However, it has also long been recognized that "[t]he silence of Congress may provide a treacherous guide to its intent." *Watt v. Alaska*, 451 U.S. 259, 271 n.13. 101 S. Ct. 1673, 1680. 68 L. Ed 2d 80 (1981) *(citing Scripps-Howard Radio, Inc. v. F.C. C.*, 316 U.S. 4, 11, 62 S. Ct. 875, 880, 86 L. Ed. 2d 1229 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."). Access Houston has not presented the Court with any evidence that the City of Houston actually had the non-local programming fee in mind when the City negotiated the 1993 franchise renewal with Warner Cable. Moreover, by the time the Warner Cable contract was negotiated, the City had appeared *in this very litigation* to disavow that it had ever authorized Access Houston to charge user fees:

> [T]he record is clear that the fee complained of is authorized by the rules of Access Houston, Inc. itself . . . and are <u>not</u> due to any action of the City of Houston .... Plaintiffs fail to allege any facts showing that the City of Houston, rather than the independent corporate entity known as Access Houston, Inc., had any role whatever in promulgating, authorizing, or enforcing Access Houston's fee requirement or other procedural rules in any fashion, as to Plaintiffs or anyone else.

Defendant's Motion to Dismiss (Nov. 30, 1992), Dkt. #8, at 4 (emphasis added).

Access Houston relies primarily on language in its By-laws permitting it to "seek and receive private, federal, state, county, and other municipal funds.' However, the issue in this case is not whether Access is authorized to "receive private . . . funds." Plainly, if the Nationalist Movement were to donate money voluntarily to Access Houston, then Access Houston could accept it. Rather, Access Houston has attempted to *withhold* access to cablecast facilities from Plaintiffs until they accede to its demands. Therefore, the crucial issue, separate and apart from authorization to accept money from users, is whether Access Houston is authorized to impose this *mandatory condition* for the cablecast of non-local programming. Obviously, authorization to "receive private, federal, state, county, and . . . municipal funds"does not authorize Access Houston to withhold cablecast services in an effort to coerce additional appropriations from the state, local, or federal authorities. Likewise, this language standing alone would not appear to authorize Access Houston to withhold services in an effort to raise funds from private users. Moreover, the Access Houston Bylaws have *never been changed* since 1986, when any authorization to charge mandatory access fees would have violated the franchise agreement between the City of Houston and Warner Cable. Considering the relevant factors, it appears that the City of Houston never authorized Access Houston to charge mandatory fees. Hence, only Access Houston can be held responsible for any violation of Plaintiffs' constitutional rights. *See generally Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (parade organizer's actions in excluding particular groups from marching in parade are not attributable

to City, which authorized organizer to conduct the parade).

2. A Determination that Access Houston's imposition of Mandatory fees was an *Ultra Vires* Act is not Dispositive of this Case

Nevertheless, further examination of relevant state law leads the Court to conclude that it cannot decide the case as to Access Houston on the basis of Access Houston's potentially *ultra vires* act. Neither Plaintiff has standing to challenge the actions of Access Houston as *ultra vires* because of the Texas Non-Profit Corporation Act. According to Tex. Rev. Civ. Stat. Ann. .art. 1396-2.03 (Vernon 1980), "Lack of capacity of a [non-profit] corporation shall never be made the basis of a claim or defense at law or in equity." Article 1396-2.03(B) specifies only three narrow categories of persons with standing to object to a non-profit corporation's actions on *ultra vires* grounds. Plaintiffs do not fall within any of those three categories.

B. Statutory Violations

Plaintiffs also contend that Access Houston has attempted to exercise "editorial control" over the PEG channels, in violation of section 531(e) of the Cable Communications Policy Act. As mentioned in the Court's earlier order, Dkt. #46, at 2, 5 & n.3, this prohibition only applies to Access Houston if it is a "cable operator," as defined in the Act. Access Houston does not fall within the definition of "cable operator." *See* 47 U.S.C. § 522(5), (6)(A). Therefore, the Court must reach the constitutional arguments that Plaintiffs have raised.

III. Analysis of Constitutional Issues

A. State Action

Plaintiffs' claims for relief based on constitutional violations are stated under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The threshold question, therefore, is whether Access Houston is a "state actor" that can deprive Plaintiffs of their constitutional rights under color of law. The Constitution's protections of individual liberty "apply in general only to action by the government;" this "fundamental limitation on the scope of constitutional guarantees . . .avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 619, 111 S. Ct. 2077, 2082, 114 L. Ed,2d 660 (1991); *cf. Wyatt v. Cole*, 504 U.S. 158, 162-64, 168-69. 112 S. Ct. 1827, 1830-31, 1834, 118 L. Ed. 2d 504 (1992) (private entities are subject to 42 U.S.C. § 1983 liability for invoking unconstitutional state law replevin or attachment procedures,

but unlike government officials, have no qualified immunity defense).

The Court finds that Access Houston is a state actor because (1) it is not a purely private entity as (a) it is a channel for communication which is open to the public and specially dedicated as a forum for expressive activity and (b) supervision over day-to-day operations has been transferred from a private owner to a government entity; and (2) Access Houston meets the qualifications for a non-profit corporation to be considered part of the government for constitutional purposes.

First, Access Houston has not shown that it is a purely private entity. If Access Houston is purely private, then it cannot violate Plaintiffs' First Amendment expressive rights any more than could the private shopping centers in *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 80-82, 84-85, 100 S. Ct. 2035, 2040-41, 2042, 64 L. Ed. 2d 741 (1980) (protesters' exercise at shopping center of expressive rights under state constitution -- which provides greater protection than federal constitution -- does not constitute compensable "taking" of shopping center owner's property), and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-70, 92 S. Ct. 2219, 2228-29, 33 L. Ed. 2d 131 (1972) (private shopping center is not a public expressive forum for First Amendment purposes). Purely private entities, by forbidding visitors from engaging in certain expressive activities, will violate individuals' expressive rights only in limited circumstances. *See, for example, Marsh v. Alabama*, 326 U.S. 501 (1946) (where company owned town and that private actor took the place of local government,

the private actor engaged in "state action"). However, the present dispute involves access to private property[6] for expressive purposes only in the sense that the cable infrastructure in Houston has been constructed and is operated by private franchisees such as Warner Cable. While an entire cable system may have characteristics of private ownership, which make it roughly analogous to a private shopping center, *cf Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 114 S. Ct. 2445, 2464-66, 2469-70, 129 L. Ed. 2d 497 (1994) (addressing argument that "must-carry" rule, requiring cable operators to transmit a specified number of broadcast stations, is subject to the strictest constitutional scrutiny be-

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[6] *But cf. Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. ___, ___, 114 S. Ct. 2445, 2451-52, 129 L. Ed. 2d 497, 62 U.S.L.W. 4647 (1994) ("Cable systems, by contrast [to broadcast stations] rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cables or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend on its very existence upon express permission from local governing authorities. See generally *Community Communications Co. v. Boulder*, 660 F.2d 1370, 1377-78 (10th Cir. 1981)."), *reh'g denied*, ___ U.S. ___, 115 S. Ct. 30, 129 L. Ed. 2d 297 (1994).

cause it forces cable operators to utilize their private property to transmit speech not of their choosing) (citing, *inter alia, Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. at 87, 100 S. Ct. at 2044 (1994)); *id.* at 2480 (O'Connor, J., joined by Scalia, Ginsburg, and Thomas, JJ., concurring in part and dissenting in part) (citing same), the PEG channels bear dramatically less resemblance to the private shopping center in *Lloyd Corp.*, than they do to the public sidewalk easement[7] where the Vietnam War protesters were required to conduct their leafleting after being required to leave the interior malls. *See Lloyd Corp.*, 407 U.S. at 566-67, 92 S. Ct. at 2228.

Specifically, the PEG channels resemble public sidewalk easements at an otherwise private commercial site, and thus, are not purely private entities because **(1)** the

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[7] *Cf. Dolan V. City of Tigard*, ___ U.S. ___, ___, 114 S. Ct. 2309, 2313-15, 2321-22, 129 L. Ed. 2d 304, 62 U.S.L.W. 4576 (1994) (addressing, for purposes of the Takings Clause of the Fifth Amendment, a City Planning Commission decision requiring a property owner, as a condition for permission to redevelop her land, to dedicate all land lying within a 100-year floodplain to municipality for use as a greenway, and an additional fifteen feet of land for use as a pedestrian/bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828, 107 S. Ct. 3141, 3144, 97 L. Ed. 2d 677 (1987) (regulatory demand for a lateral public easement across a beachfront lot in exchange for a permit to demolish a beach house and build a larger one).

channel or easement is open to the public,[8] *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577- 78, 100 S. Ct. 2814, 2827-28, 65 L. Ed. 2d 973 (1980) ("People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; . . . subject to the traditional time, place, and manner restrictions . . . streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised . . . . ") (citations omitted); 47 U.S.C. § 531(a), (b), (e); **(2)** the channel or easement is either specially dedicated or traditionally understood to be a forum for expressive activity, *id.; see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705-06, 120 L. Ed. 2d 541 (1991), and **(3)** supervision and control over the day-to-day operation of the easement or channel has been transferred from the private owner to a government entity. *See* 47 U.S.C. § 531(b), (d), (e) ("A franchising authority may . . . require as part of a franchise, and may require as a part of a cable operator's proposal for a franchise renewal . . . that channel capacity be designated for public, educational, or governmental use . . . and may require rules and procedures for the use of the channel capacity designated pursuant to this section. . . . [A] cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capac-

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[8] Although the PEG channels are open for the public to view programming only in the sense that all cable subscribers have access to them, by every indication in the record, cablecast services are available to the entire community without regard to whether a person or group in fact subscribes to cable.

ity . . . ."). It is pursuant to the federal statutory authorization quoted above, 47 U.S.C. § 531(a), (b), that the City of Houston has made the dedication of specified channel capacity to PEG programming a mandatory precondition for any cable franchise or franchise renewal.

Although the franchise agreements place control over the PEG channels in the hands of the franchisor, the City of Houston, *see, e.g.*, City of Houston Ordinance No. 93-156, § 11 (1993 Warner Cable franchise agreement), the City has elected not to retain day-to-day control over the operation of the PEG channels. Rather, it has assigned operation and management of the access channels to Access Houston, a nonprofit corporation created solely for that purpose. *See* City of Houston Ordinance 94-986, §§ 1.01, 2.01(I) (contract between the City of Houston and Access Houston). Additionally, every quarter the City transfers a substantial portion of the cable franchise fees it receives to Access Houston for the purpose of funding Access's operating budget. *Id.* §§ 3.01-3.02. All members of the Access Houston Board of Directors are "nominated by the Mayor of the City of Houston and confirmed by the City Council of the City of Houston." City of Houston Ordinance 86-1733, art. VI, § 6 (Access Houston Bylaws).

Second, the mere fact that Access Houston is a nonprofit corporation, as opposed to a department of city government, does not preclude the possibility that it is a state actor for First Amendment purposes. In *Lebron v. National R.R. Passenger Corp.*, the Supreme Court held that the National Railroad Passenger Corporation, or Amtrak, which was established by Congress and incorporated "as

a for profit corporation" under the District of Columbia Business Corporation Act, "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," even though its authorizing statute declared that Amtrak "will not be an agency or establishment of the United States Government." 513 U.S. 374, 115 S. Ct. 961, 970-74 (1995). The Court held that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment. . . ." *Id.* at 971, 973. For constitutional purposes, Access Houston, which is a nonprofit corporation created by city ordinance, solely for the purpose of advancing local, and other, governmental objectives, and which is controlled by a board whose members are all appointed by the Mayor of Houston and approved by the City Council, is not distinguishable from Amtrak in any material way. Therefore, the Court finds that Access Houston is a state actor for constitutional purposes.[9]

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[9] It should be noted that because Access Houston is a state actor which operates an expressive outlet available to the general public, its exclusion of particular speakers or viewpoints from that expressive outlet cannot be justified on the ground that the exclusion is itself a protected First Amendment expressive activity. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (Supreme Court not presented with question of whether 'state action' nexus is satisfied by

B. Summary Judgment Standard

Summary judgment may be entered if the pleadings and evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 25 53, 91 L. Ed. 2d 265 (1986); *Wallace v. Texas Tech Univ.*, 80 F. 3 d 1042, 1046-47 (5th Cir. 1996). When the movant is the defendant, it may rely on the absence of evidence to support an essential element of the plaintiffs case. *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2553; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). If the movant carries its burden, the nonmovant must then designate specific facts showing a genuine issue for trial. *Wallace*, 80 F. 3d at 1047; *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994).

C. Analysis of First Amendment Issues

1. *Forsyth County, Ga. v. The Nationalist Movement*

Plaintiffs argue that Defendants have violated their First Amendment expressive rights by charging them a fee

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city-authorized parade sponsor's exclusion of contingent from parade due to contingent's expressive message, and therefore defers to determination below that the sponsor's actions represent purely "private conduct').

because *Airlink* is produced "elsewhere" than in the Houston SMSA. In supporting their facial challenge to the mandatory fee rule, Plaintiffs primarily rely upon *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992), although they cite other authority in a seemingly scatter-gun fashion. Not surprisingly, Plaintiff s counsel represented the Nationalist Movement in the *Forsyth County* case, and he now attempts to cast this dispute in a *Forsyth County* mold. However, what the Supreme Court found objectionable in *Forsyth County* was the arbitrary discretion that a parade permit fee rule placed in the hands of a county administrator. *See id.* at 133-34, 112 S. Ct. at 2401, 2403-04. In *Forsyth County*, the challenged ordinance granted a county administrator authority to set the amount of a parade fee anywhere between one dollar and $1000.00, *see id.* at 126, 112 S. Ct. at 2399, and permitted the administrator to "adjust the amount . . . in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order . . . ." *Id.* at 126, 132-33, 112 S. Ct. at 2399, 2402. Thus, the Court was concerned that the ordinance would often require that the fee be based on the content of the speech. *See id.* at 126, 112 S. Ct. at 2398-99, 2402-04 (noting that the ordinance itself was passed "as a direct result" of two civil rights marches in Forsyth County, the first of which ended when members of a Nationalist Movement affiliate and the Ku Klux Klan threw rocks and beer bottles at the marchers, the second of which occurred the following weekend and became "the largest civil rights demonstration in the South since the 1960s").

Although Plaintiffs strive to identify as many hypothetical borderline cases as possible in an effort to demonstrate that Access Houston administrators exercise some discretion in administering the fee rule for non-local programming, *See* Dkt. #16, the Access Houston fee does not vest any administrator with such discretion that a *Forsyth County* facial challenge would require Access Houston's fee to be held invalid. "In evaluating [a] facial challenge, [the Court] must consider the [government entity's] authoritative constructions of [its own rule], including its own implementation and interpretation of it." *Id.* at 131, 112 S. Ct. at 2402 (citing authorities). In the present case, Access Houston has specified that it defines "produced elsewhere" to mean that 50 percent or more of the footage to be shown was shot outside the greater Houston SMSA. Hence, Access has established a clear line to guide whatever discretion an administrator might exercise. Moreover, the administrator has no discretion to set the amount of the fee; the amount is fixed and depends solely on two rather clear-cut determinations -- whether an individual or a group has submitted a program, and where the program was produced. Hence, the Access Houston fee rule does not raise any of the potential censorship concerns associated with the *Forsyth County* parade fee.

Plaintiffs, of course, contend that no matter how clear Access Houston's policy may appear on paper, in actual practice Access Houston applies it in a discriminatory and constitutionally impermissible manner. However, such an argument has no place in a *facial* challenge to the Access fee rule.

2. The Content Neutrality of the Fee Rule and the *O'Brien* Standard of Review

The threshold question in analyzing the constitutionality of this rule is to determine, under applicable First Amendment precedent, what standard of review to apply. In *Turner Broadcasting v. F. C. C.*, the Supreme Court analyzed a "must carry" rule, which required cable operators to transmit a specified number of local commercial and public broadcast stations, and determined that such a content-neutral regulation is subject to the *O'Brien* intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. *See Turner Broadcasting*, 512 U. S. 622, 662, 114 S. Ct. 2445, 2469-72 (1994). Under *O'Brien*, a content-neutral regulation will be sustained "[1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to that interest." *Id.* (quoting *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679). The Court determined that the "must carry" rules were content-neutral for three reasons: (1) "[t]he rules impose obligations on all operators [and] . . . [n]othing in the act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select"; (2), while "[t]he must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete . . . this burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers"; and (3) "the privileges conferred by the

must-carry rules are also unrelated to content." *Id.* at 2460.

Significantly, another court has evaluated other cable regulations, which are similar to those in the present case as they supported "localism," and determined that they should be analyzed under *O'Brien*'s intermediate scrutiny test. See *Chicago Cable*, 879 F.2d 1540, 1550- 51 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). In *Chicago Cable*, three cable companies sought restitution of fines they had paid to a local cable regulatory commission for violation of the "local origination," or "LO," provisions in their franchise agreements. *Id.*, 879 F.2d at 1542 (the franchise agreements mandated nine hours of local programming which was to be produced by the individual cable system within the city of Chicago; Chicago Cable unsatisfactorily sought to fill this "LO" time with shows produced by affiliated cable systems in Chicago suburbs and shows produced within the city of Chicago by non-affiliated cable systems). The court held that it was constitutional for the local cable regulatory commission to require the cable operators to produce the mandatory LO programming in Chicago. *See id.* at 1547-51.

In reaching its decision, the *Chicago Cable* court applied the familiar test from *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded first that the Chicago "LO" rule was related to the "important or substantial [government] interest" of "[e]ncourag[ing] . . . 'localism.'" *Id.* at 1549 (citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454-62 (D.C. Cir. 1985)). The *Chicago Cable* court reasoned that "[p]romotion of community self expression can increase direct communication between resi-

dents by featuring topics of local concern. . . . [and t]he important qualities embodied in the term "localism" (community pride, cultural diversity, etc.) ... may require original cable programming specifically concerning the locality and directed at the locality's residents." Second, the court found that the LO "restrictions were 'no greater than is essential for the furtherance of that interest.'" *Id.* at 1550 (quoting *Quincy Cable*, 768 F.2d at 1459 (quoting *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679)). Interestingly, the court found that *O'Brien* was satisfied even though the LO requirements were "content-related." *Id.* at 1550 ("[B]urdens of this kind are not invalid just because there might be some less burdensome alternatives. 'So long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, " an incidental burden on speech is permissible under *O'Brien.*'").

Under *Turner Broadcasting* and *Chicago Cable*, the Court is convinced that the mandatory fee rule is valid under the *O'Brien* test. The local programming requirements imposed by the City of Houston on Access Houston are similar to the local content rules which were approved in *Chicago Cable.* Additionally, the Access Houston fee, like the LO provision, was established for the avowed purpose of "encouraging . . . localism," *see* Dkt. #24, at 6-7. But unlike *Chicago Cable*, in this case, the imposition of mandatory fees on programs produced outside of the Houston area is a content-neutral regulation. The fee rule fosters "localism," but not in a content-related way. There is no requirement that the programming concem a local issue or feature local matters in any way. Furthermore, the "speak-

ers" themselves need not be local. All that is required is that the program be produced in Houston, thereby encouraging localism in the form of local jobs and the encouragement of local involvement in production. In fact, even programs which address exclusively local issues and which are submitted by local residents may still be charged a fee if the production takes place outside of Houston. That the mandatory fee rule is content-neutral is, therefore, quite clear. Thus, the rule qualifies for intermediate scrutiny under *O'Brien*. For the reasons stated below, application of the *O'Brien* test reveals that the mandatory fee rule is facially constitutionally valid.

First, the *Chicago Cable* court specifically recognized the promotion of "localism" or "community self-expression" as an "important" government interest. 879 F.2d at 1549-50. In fact, even the members of the Supreme Court who dissented in *Turner Broadcasting* recognized that the promotion of localism may be an important government interest. *See Turner Broadcasting*, 512 U.S. at 622, 114 S. Ct. at 2478 (O'Connor, J., joined by Scalia, Ginsburg, and Thomas, JJ., dissenting) (although the dissent believed that "localism" cannot qualify as a compelling interest, they did state that "[i]t is a legitimate interest, perhaps even an important one [which] certainly the government can foster . . . by, for instance, providing subsidies from the public fisc"). Therefore, just as the *Chicago Cable* court recognized localism as an important government interest satisfying part of the *O'Brien* test, this Court recognizes the important interest in localism in this case.

With respect to *O'Brien*'s second criteria, this impor-

tant government interest is unrelated to the suppression of free expression. This is clear from the fact that the mandatory fee rule is content-neutral. In fact, it is more clear in this case that the regulation is unrelated to the suppression of free expression than it was in *Chicago Cable*, since the *Chicago Cable* court recognized that the local-content requirements were "content-related." Here, there is no restriction on the content of one's expression; the fee is based only on the place of production.

Finally, the incidental restriction on alleged First Amendment freedoms, which potentially results from the imposition of a mandatory fee for the broadcast of non-local productions, is no greater than is essential to the important interest in "localism." Significantly, whereas the *Chicago Cable* court upheld a local regulation that required *all* LO time to be filled with locally- oriented and locally produced programming, the Access Houston rule results in a substantial amount of non-local programming for the PEG channels which are restricted not by their "locally oriented" content, but only by the imposition of the fee. The imposition of the fee is a simple, content-neutral way of promoting local production. Furthermore, it is consistent with the other preferences given to locally-produced programs, preferences with which the Plaintiffs do not quarrel. Therefore, the mandatory fee rule satisfies the *O'Brien* test on its face and Plaintiffs' summary judgment motion must be denied.

Moreover, Defendant Access Houston's motion for summary judgment must be granted because Plaintiffs have offered no evidence that the fee rule is unconstitutional as

applied. In particular, Plaintiffs have failed to establish a fact issue as to whether Access Houston has applied the fee rule in a discriminatory way to programs which are "produced elsewhere." In an effort to persuade the Court that an administrator of the fee rule might have discretion in applying the fee rule, the Plaintiffs pose many hypothetical situations that indicate the danger of discretion. But such hypotheticals are potentially relevant only to *Plaintiffs'* facial challenge; with respect to *Defendant's* motion for summary judgment, Plaintiffs have failed to show that Access Houston treated non-local productions differently, by discriminating on the basis of content when applying the fee rule. Rather, Thomas J. Cantrell, executive director of Access Houston, has repeatedly asserted (1) that he makes *no* determination of whether a program is locally produced because he relies on the applicant's representations of where the program is produced, and (2) that he could not base any fee determination on the content of the programming because he has no way of knowing the content of the program at the time the fee determinations are made. *See* Transcript of Hearing on Temporary Restraining Order, Testimony of Thomas J. Cantrell, Dkt. #34, pp. 13-19. Plaintiffs have not countered Cantrell's assertions with a single instance of discriminatory treatment of non-local programs. Therefore, there is simply no evidence in the record that the fee rule is applied in an unconstitutional way.

IV. Conclusion

Plaintiffs' motion for summary judgment (Dkt. #15) is therefore DENIED. Access Houston's motion for sum-

mary judgment (Dkt. #33) is GRANTED. The City of Houston's motion to dismiss (Dkt. #8) shall be treated as a Rule 56 summary judgment motion, see FED. R. Civ. P. 12(b), and GRANTED.

It is so ORDERED. The clerk shall enter this order and provide all parties a true copy.

Signed this 16th day of October, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

Appendix 61

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT HORTON, BARRY HACKNEY,
and NATIONALIST TELEVISION,
a subsidiary of THE NATIONALIST
MOVEMENT, a Texas
Nonprofit Corporation,

Plaintiffs,

V.

CITY OF HOUSTON, TEXAS,
a Texas municipal corporation,
and ACCESS HOUSTON
CABLE CORPORATION, a
Texas corporation,

Defendants.

CIVIL ACTION NO. H-92-3451

Appendix 62

FINAL JUDGMENT

For the reasons stated in the Court's October 16, 1997 Order granting summary judgment in favor of Defendants, it is ORDERED that this case is dismissed with prejudice. Because Defendants are the prevailing parties, Plaintiffs shall pay Defendants' costs.

THIS IS A FINAL JUDGMENT.

Signed this 16th day of October, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

Appendix 63

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT HORTON, BARRY HACKNEY,
and NATIONALIST TELEVISION,
a subsidiary of THE NATIONALIST
MOVEMENT, a Texas
Nonprofit Corporation,

Plaintiffs,

V.

CITY OF HOUSTON, TEXAS,
a Texas municipal corporation,
and ACCESS HOUSTON
CABLE CORPORATION, a
Texas corporation,

Defendants.

CIVIL ACTION NO. H-92-3451

Appendix 64

ORDER

Before the Court is Plaintiffs' Motion to Reconsider the Court's order granting summary judgment in favor of Defendants (Dkt. #62).[10] In support of their motion for reconsideration, Plaintiffs argue that Access Houston's decision to broadcast several episodes of *Airlink* during the initial stages of litigation constitutes arbitrary and capricious conduct in applying the fee rule. Such conduct, Plaintiffs assert, is unconstitutional under *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123 (1992).

The information presented by Plaintiffs in their motion for reconsideration is not new to the Court. The Court was fully aware of Access Houston's conduct when it addressed and transcript. The Court finds that it was reasonable and necessary for Defendant Access Houston to obtain a copy of the transcript in order to adequately respond to Plaintiffs' allegations. Therefore, the objections to the transcript charge are OVERRULED.

Finally, given the reasonable amount of costs sought by Defendant, the Court also declines to reduce costs on the basis of Plaintiffs' alleged "civic minded" nature. Therefore, costs shall be assessed against Plaintiffs in the amount of $527.54.

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[10] Although Defendant City of Houston argues that Plaintiff's motion is untimely, the Court notes that under Fed. R. Civ. P. 6(a) and 59, the motion is timely as it was filed within ten days after the entry of final judgment (excluding weekends).

It is so ORDERED.

The clerk shall enter this Order and provide a true copy to each party.

Signed this 5th day of December, 1997.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE